No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
Petitioner,

v.

DAVID WAYNE GREENFIELD,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF THE RESPONDENT

JAMES D. WHITTEMORE
(Appointed by this Court)
Whittemore & Campbell, P.A.
One Tampa City Center
Suite 2470
Tampa, Florida 33602
(813) 224-9550
Counsel for Respondent,
DAVID WAYNE GREENFIELD

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED*

I. Whether the use of a defendant's post-arrest, post-Miranda silence, including his request for counsel, as substantive evidence of his sanity at or near the time of the offense is a violation of due process, when that defendant does not testify. *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

II. Whether defense counsel's failure to object to the introduction of testimony concerning defendant's post-Miranda silence constitutes a procedural default barring review under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), where defense counsel objected to the prosecutor's comment upon defendant's post-Miranda silence during summation and the state appellate court addressed the merits of the issue, or whether review by this Court should be denied because Petitioner failed to raise the *Wainwright* v. *Sykes* question in the Court of Appeals except in a Petition for Rehearing?

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, except as supplemented as follows:

When officer Pilifant approached Greenfield on Lido Beach, it was nearly two hours after the assault for which Greenfield was charged had occurred (TR-72-74). Petitioner's version of the facts would suggest a more immediate confrontation with Greenfield in relation to the time of the assault, a potentially significant difference in light of the issue as to the probative value of Greenfield's post-Miranda silence.

SUMMARY OF ARGUMENT

In *Doyle* v. *Ohio*, 426 U.S. 610 (1976) this Court proscribed the use of defendant's post-arrest, post-Miranda warning silence to impeach a defendant's explanation of an offense, as violative of the due process clause of the Fourteenth Amendment. Silence was deemed to be "insolubly ambiguous" and therefore non-probative, as silence in the wake of Miranda warnings may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, because the Miranda warnings implicitly assure a defendant that his silence will carry no penalty, it would be "fundamentally unfair and a deprivation of due process" to allow the use of silence to impeach an explanation of the crime subsequently offered at trial. 426 U.S. at 618.

Where, as in the instant case, a Defendant does not testify during trial, there can be no constitutional or rational basis for not applying *Doyle*, even though the defense of insanity has been raised. Silence is particularly ambiguous when considered in the post-arrest, post-Miranda scenario. A suspect may not have heard or fully understood his rights or may simply have felt there was no need to reply. He may have maintained silence out of fear

or unwillingness to incriminate another. He may have reacted with silence in response to a hostile and unfamiliar atmosphere surrounding his arrest or detention. *United States* v. *Hale*, 422 U.S. 177 (1975).

The passage of time has not rendered silence any more meaningful than it was when *Hale* and *Doyle* were decided. That the mental state of a defendant is placed in issue during trial does not render his post-arrest, post-Miranda silence any less ambiguous. In this case, in particular, silence and a purported exercise of constitutional rights was entirely consistent with Greenfield's diagnosis of paranoid schizophrenic. Particularly, where, as here, Greenfield's silence and exercise of his rights came nearly two hours after the offense, Greenfield's ability to understand and exercise his rights at the time of arrest is entirely consistent with being insane at the time of the offense, as the classic paranoid schizophrenic experiences intervals of lucidity and rationality and irregular shifts between lucid and confused moments.

Traditionally, from an evidentiary standpoint, silence has been admissible only under circumstances which would naturally call for a denial of an assertion of fact. 4 Wigmore, Evidence § 1071. A fortiori, if the circumstances do not naturally call for denial, the failure to deny lacks probative value and should not be admissible. Mere silence of a party, under circumstances which would not naturally call for a statement or response, creates no evidence, one way or the other. Traditionally, therefore, the probativeness of silence is conditioned upon the capability of the party remaining silent to understand the meaning of the statements or assertions made to him, his having sufficient knowledge of the facts to reply and a statement made under circumstances which would naturally call for a reply to a person normally entitled to a

reply. Here, Greenfield had no obligation to reply to a police officer who, after having just arrested him, advises him that he has the right to remain silent. Because of the remoteness in time of his arrest to the offense, and the consistency between silence and his diagnosed condition, Greenfield's silence at the time of his arrest had no tendency to make his sanity at the time of the offense more probable or less probable than it would be without evidence of silence.

The assurances of Miranda are significant to all criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Nothing embodied in the Miranda warnings warn a defendant that his silence may be used in those cases where his sanity is placed at issue. Under these circumstances, the use of Greenfield's silence by the prosecutor placed a price on Greenfield's exercise of his Fifth Amendment rights and contradicted the implicit assurances of his Miranda warnings. Because that silence may have been induced by those implicit assurances, it was fundamentally unfair and a violation of Greenfield's due process rights for his silence to be used against him.

It is unnecessary, in the ordinary case, for a prosecutor to use silence to suggest that a defendant was sane when confronted by police at or near the time of the offense. The prosecutor is always able, and was able in this case and in fact did so, to elicit testimony as to a defendant's demeanor and behavior. Necessity, therefore, cannot justify the use of one's silence and the exercise of a constitutional right, given the assurance contained in the Miranda warnings. Because Greenfield did not testify, there is no need to "ferret out perjury" or to cross-examine and impeach a prior inconsistent statement.

If there is to be any meaning in the Miranda warnings and the Fifth Amendment privilege to a defendant confronted by a police officer, the use of silence in the wake of these warnings must be prohibited, regardless of the defense asserted. There can be no rational distinction between "guilt" and "sanity" for purposes of applying Miranda and *Doyle*. Mental intent in an essential element of a criminal offense in Florida which must be proved beyond a reasonable doubt, together with the other essential elements of the offense. Post-Miranda silence, in the absence of inconsistent testimony by the defendant, cannot be used as substantive evidence of guilt, whether offered against an essential element of an offense or to rebut the affirmative defense of insanity. The insanity defense cannot, any more than other defense, be prejudiced by the admission of unconstitutional evidence. See: e.g. *Kaufman* v. *United States*, 394 U.S. 217, 230 (1969). A defendant who raises an insanity defense should not be any less entitled to the protection of due process simply because the crux of his case revolves around his mental state. Use of post-Miranda silence is no less egregious than in other case and carries no less a penalty.

II.

For the first time since the United States Magistrate addressed the issue, with the exception of a Motion for Rehearing filed with the Eleventh Circuit Court of Appeals, Petitioner contends that consideration of this constitutional issue is barred by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). This was not assigned as error in the court below nor did the court below consider *Wainwright* v. *Sykes*, other than parenthetically in a footnote in the decision (JA 10). Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. Considerations of judicial efficiency demand

that a *Sykes* claim be presented before a case reaches the Supreme Court. *Jenkins* v. *Anderson*, 447 U.S. 231, 234, n.1.

Alternatively, review is not barred by *Wainwright* v. *Sykes*, as the issue was raised before and addressed by the Florida Second District Court of Appeal when Greenfield appealed from his conviction. Furthermore, Greenfield's counsel preserved the issue for appeal (and subsequent federal review), by objecting during the prosecutor's summation when actual use was made of Greenfield's silence. Since those remarks during summation were in themselves violative of *Doyle* and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under *Sykes*, since the related objection sufficiently raised the constitutional issue. *Thomas* v. *Estelle*, 582 F.2d 939 (5th Cir. 1978).

Independent of the Magistrate's specific findings which were not appealed, there existed "cause" for counsel's failure to object and "prejudice" which warrants federal review. Counsel's failure to object was a result of neglect and inattentiveness, rising to the level of ineffectiveness, and is not attributable to an intentional decision by counsel made in pursuit of his client's interests. *Reed* v. *Ross*, ___ U.S. ___, 104 S.Ct. 2908 (1984). Counsel's neglect and inattentiveness allowed a prosecutor to not only bring forth evidence of post-Miranda silence but to actually use it during argument. This underminded the only defense available to Greenfield. In this close case, in which the jury ultimately had to resolve conflicting expert testimony, it cannot be said that the prosecutor's use of Greenfield's silence did not prejudice the defense.

ARGUMENT

The use of Greenfield's silence during his trial fell clearly within the proscription against the use of

post-*Miranda*[1] silence announced by this Court in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Contrary to the urging of Petitioner, the Eleventh Circuit's opinion correctly followed and applied the rule set forth in *Doyle*.

In *Doyle*, this Court held that a prosecutor's use of a defendant's post-arrest, post-Miranda warning silence, to impeach the defendant's alibi defense, violated the due process clause of the Fourteenth Amendment. Two reasons for proscribing the use of a defendant's post-arrest, post-Miranda silence were given. First, such silence was deemed to be "insolubly ambiguous." 426 U.S. at 617. The ambiguity was said to exist because the Miranda warnings advise a defendant that he has the right to remain silent, that anything he says may be used against him and that he has the right to consult with counsel before submitting to interrogation and that silence in the wake of these warnings may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, while Miranda warnings do not contain an express assurance that silence will carry no penalty, there is an implicit assurance in the warnings that one's silence will carry no penalty. In light of this implicit assurance, this Court determined it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation of the crime subsequently offered at trial. 426 U.S. at 618.

Petitioner claims that he "does not challenge the holding in *Doyle*," but contends that the Eleventh Circuit has "improperly extended *Doyle* beyond the facts of that case." (Petitioner's br. at p. 15). *Doyle*, however, was not limited to its own facts. Referring to the Miranda warnings as a "prophylactic means of safeguarding Fifth Amendment rights," this Court observed generally that:

> "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, *every* post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested." 426 U.S. 617 (emphasis added).

Furthermore, this Court observed that the assurance in the Miranda warnings that silence would carry no penalty was "implicit to *any* person who receives a warning" and that "in such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial" (emphasis added). 426 U.S. 618. Not only does this Court's opinion in *Doyle* apply its holding generally to all arrested defendants, it does not distinguish between defenses in its treatment of the "dubious probative value" of silence and the unfair use of silence in the face of the Miranda assurance.

The rationale of the rule prohibiting the use of or comment upon a defendant's silence finds origin in earlier cases decided by this Court.[2] A reading of *Doyle*, *Hale* and *Griffin* identifies three now historical reasons for

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[2] *Griffin* v. *California*, 380 U.S. 609 (1965), holding that it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when under police custodial interrogation and therefore the prosecution may not use at trial the fact that he stood mute or claimed his privilege in the face of accusation. See also: *United States* v. *Hale*, 422 U.S. 171 (1975), holding that an accused's silence during police interrogation lacks significant probative value, observing that in most circumstances, silence is so ambiguous that it is of little probative force. 422 U.S. at 176.

prohibiting the use of and comment upon a defendant's post-arrest silence. First, it is insolubly ambiguous and therefore lacks probative value. Secondly, in light of the implicit assurance contained in the Miranda warnings, use of silence in the wake of these warnings imposes a penalty upon a defendant for the exercise of his constitutional rights. Finally, it is fundamentally unfair and a deprivation of due process to allow the use of one's silence in view of the implicit assurances in the Miranda warnings and the accused's right to rely on that assurance.

Admittedly, *Doyle* addressed the use, for impeachment purposes, of one's post-Miranda silence when the defendant testifies at his trial and offers an exculpatory version of the facts. In this respect, *Doyle* differs from the instant case in that Greenfield did not take the stand and therefore the prosecutor's use of and comment upon his post-arrest silence cannot be construed as an attempt to impeach testimony. To this extent, of course, the facts in the *Doyle* case are distinguishable from those in the instant case. Yet, application of *Doyle* to the instant facts does not, at least on this basis alone, constitute an "unwarranted extension" of *Doyle*, for even the dissenters in *Doyle* agreed that evidence of post-arrest silence is inadmissible to show guilt. 426 U.S. 610, 634-635.

Petitioner argues that post-arrest silence, notwithstanding *Miranda* and *Doyle*, should be admissible to "prove sanity" (Petitioner's br. at p. 17). In making this argument, Petitioner promotes exactly what has been uniformly proscribed, even by the dissenters in *Doyle*, the use of silence to show guilt. Petitioner's contention that Greenfield never "seriously contested" the commission of the offense is but an attempt to draw an artificial distinction between the issues of guilt and sanity which ignores the prosecution's fundamental burden of proof.

The fact remains that Greenfield's defense counsel never conceded that his client had committed the acts, contested certain elements of the offense and the jury was instructed on the state's burden of proof apart from its burden with respect to the insanity defense. Furthermore, Florida law does not bifurcate its criminal trials into separate guilt and sanity phases. *State Ex Rel. Boyd* v. *Green*, 355 So.2d 789 (Fla. 1978), (declaring that Florida's (former) insanity statute which bifurcated the trial unconstitutional, reasoning that the intent of the accused is an essential element of the offense and a bifurcated trial improperly presumes the requisite intent, contrary to the state's burden of proving each and every element of the offense beyond a reasonable doubt).

Petitioner complains that *Miranda* and *Doyle* "were never intended to apply where the question of the accused's commission of the crime charged was not an issue." He suggests that once a defendant raises an affirmative defense, he has in essence admitted his "guilt" with respect to the physical acts.[3] (Petitioner's br. at p. 21, 22) The fallacy of Petitioner's argument is that while on the one hand he recognizes that silence cannot be used to prove guilt, on the other, he suggests that it should be allowed as evidence probative to an essential element of the offense which must be proven by the prosecution to establish guilt.

The issue before the Court is not, as Petitioner urges, whether the Eleventh Circuit engaged in an "unwar-

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[3] In Florida, the defendant has the burden of introducing significant evidence to raise a reasonable doubt as to sanity. The burden then shifts back to the state, and "it devolves upon the state to show the sanity of the accused, as well as any other element of the crime." *Armstrong* v. *State*, 9 So. 1 (1891).

ranted extension" of *Doyle*.[4] Actually, the issue is whether this Court can rationally and constitutionally carve out an exception to *Doyle* which would allow the use of silence to prove guilt when sanity is at issue.

At page 19 of Petitioner's brief, he asserts:

> "Had *Miranda* not been administered, the evidence regarding Respondent's desire for an attorney and his decision to remain silent would clearly be admissible. Citing *Fletcher* v. *Weir* 455 U.S. 603 (1982).

This is an incorrect reading of *Fletcher* v. *Weir*. In *Fletcher*, the defendant *testified* and was impeached by his post-arrest, *pre*-Miranda silence. This Court, finding no constitutional violation, held:

> "In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for the state to permit cross-examination as to post-arrest silence *when a defendant chooses to take the stand.*" 455 U.S. at 607. (emphasis added)

Greenfield did not take the stand in his defense and his silence came only after he had been given his Miranda warnings containing the affirmative assurances which were conspicuously absent in *Fletcher* v. *Weir*.

Conspicuously absent from Petitioner's brief is a treatment of the constitutional basis recited by this Court in *Doyle* and in each opinion of this Court since, for the rule proscribing the use of silence. Rather than address this fundamental issue, Petitioner complains that precluding

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[4] In his brief on the merits, Petitioner accuses the Eleventh Circuit of having "improperly extended *Doyle* beyond the facts of that case" (Petitioner's br. at p. 15). Petitioner refers to the Eleventh Circuit's holding as an "unwarranted extension of *Doyle*." (Petitioner's br. at p. 12).

the use of silence will "penalize the state for following proper procedures and promptly advising respondent of his rights" (Petitioner's br. at p. 19). The irony of Petitioner's argument is that the constitutional issue in all likelihood would never have arisen had the prosecutor not elicited testimony that Greenfield had remained silent and requested to speak to an attorney after being warned of his rights.

To suggest that the "police officers at bar" have been penalized by the preclusion of the use of Greenfield's post-Miranda silence is absurd. The police officers merely responded to questions asked of them by a prosecutor who could have and should have restricted his examination. Petitioner's reference to *New York* v. *Quarles*, ___ U.S. ___, 104 S.Ct. 2626, (1984) to the extent it is reliance, is misplaced. The "public safety exception" to Miranda has nothing whatsoever to do with a comment upon and use of a defendant's post-Miranda silence and invocation of constitutional rights.

The Mystery Of Post-Arrest, Post-Miranda Silence, Revisited

The passage of time has not rendered silence any more meaningful than it was when *Hale* and *Doyle* were decided. Silence is particularly ambiguous when considered in the post-arrest, post-Miranda scenario.

> "At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision in these often emotional and confusing circumstances. A suspect may not have heard or fully understood the question or may have felt there was no need to reply. (Citation omitted) He may have maintained silence out of fear or unwillingness to incriminate another. Or the

> arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention." *United States* v. *Hale*, 422 U.S. at 177.

Silence today is still "insolubly ambiguous," regardless of the defense which a defendant presents during the course of his trial. As observed by the Supreme Court of Florida:

> "In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the *Hale* decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt." *State of Florida* v. *Burwick*, 442 So.2d 944, 948 (Fla. 1983), cert. denied ___ U.S. ___, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984) in which the Florida Supreme Court specifically disapproved of the decision of the Florida Second District Court of Appeal in *Greenfield* v. *State*, 337 So.2d 1021 (Fla. 2nd DCA 1976).

The Eleventh Circuit's opinion reflects a considered evaluation of the trial testimony of the two psychiatrists who considered Greenfield to be paranoid schizophrenic.[5]

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[5] Dr. Loce, a psychiatrist appointed by the court to examine Greenfield, determined that he was unable to tell right from wrong or to know the consequences of his acts and classified him as schizophrenia paranoid type (SR 126). According to Dr. Loce, Greenfield exhibited classic symptoms of a paranoid schizophrenic, in that he was "quite suspicous . . . feeling that people were trying to cause him difficulty," for example. A typical paranoid schizophrenic would not, if approached by police, flee as "he would not realize that he had done anything that was wrong or that he had any trouble coming or any consequences. Policemen wouldn't bother him because it wouldn't click." (SR 143). Greenfield exhibited a tendency to withdraw from reality, "that he didn't like being around people." (SR 154).

Dr. Piotrowski, a psychiatrist, examined Greenfield pursuant to court order and diagnosed him as paranoid schizophrenic and antisocial personality (SR 221).

Dr. Gonzalez, a psychiatrist testifying for the state, determined that Greenfield knew the difference between right and wrong and found no evidence of disorder (SR 284, 285). In describing the four cardinal symptoms of schizophrenia, known as the "four a's of Bluler," Gonzalez explained that autism is typified by withdrawal (SR 288).

Observing that the psychiatric testimony suggested that such a person is often quiet, the Court appropriately determined that the probative value of one's post-arrest, post-Miranda warning silence in determining his sanity "will vary markedly with the disease he has, the symptoms he tends to exhibit and the closeness in time between the arrest and warning and the crime" (JA 22). Observing that silence, under these circumstances, might only reflect one's paranoia that the authorities were persecuting him even though he was innocent, and that silence would be consistent with the mental disease of paranoid schizophrenia, the Court appropriately determined that such evidence was not probative of Greenfield's sanity (JA 24).

At page 16 in his brief, Petitioner concludes, without any supporting authority or empirical foundation, that Greenfield's demeanor "about two hours after the offense occurred" "was certainly relevant." This conclusion begs the question. What exactly was it "certainly relevant" to?

Relevance and probative value cannot be so easily presumed. In the context of this case, in which Petitioner's insanity defense rested on his diagnosis of paranoid schizophrenic, whether he was "ranting, raving, incoherent or obviously confused or unbalanced" would not have had and does not now have any bearing on whether Greenfield's particular condition rendered him insane under Florida law. The question of relevance and

probative value cannot be couched in terms of normality versus incoherency. Petitioner's approach in this regard is not only naive but fails to truely address the issue he frames. Obviously, there is a distinction between purely "demeanor" evidence which may or may not be relevant, depending on the nature of the mental condition advanced by a defendant, and that same defendant's silence and invocation of constitutional rights in the wake of Miranda warnings.

Petitioner does not even mention silence in his discussion of so called "demeanor" or "behavior" evidence. It is not Greenfield's position nor has it ever been that a prosecutor should be precluded from presenting purely demeanor or behavior evidence or what has been referred to a "observed physical characteristics"[6] in an effort to impeach an insanity defense.

It has been said that relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly proveable in the case.[7] In other words, "does the item of evidence tend to prove the matter sought to be proved?" Advisory Committee's Note to Rule 401, Fed.R.Evid. Obviously, all relevant evidence is not admissible, as there may be procedural exclusionary rules or constitutional prohibitions which prevent the use of evidence, even though relevant.[8]

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[6] *Kaufman* v. *United States*, 350 F.2d 408, 416 (8th Cir. 1965) cert. denied 383 U.S. 951 (1966).

[7] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, Federal Rules of Evidence; Florida Statute 90.402 (1983).

[8] The Constitution will impose basic limitations upon the admissibility of relevant evidence, such as evidence obtained from unlawful search and seizure, *Weeks* v. *United States*, 232 U.S. 383 (1914); *Katz* v. *United States*, 389 U.S. 347, (1967) or incriminating statements elicited from an accused in violation of right to counsel, *Massiah* v. *United States*, 377 U.S. 201 (1964).

Traditionally, a failure to speak will constitute an admissible admission only when the silent party would have, under the circumstances, naturally been expected to deny an assertion of fact. 4 Wigmore, Evidence § 1071. A fortiori, if the circumstances do not naturally call for denial, the failure to deny lacks probative value and should not be admissible. *McCormick et al. on Evidence 2d Ed. § 161.* As Wigmore notes:

> "Silence *may* imply assent to the correctness of a communication, but on certain conditions only. The general principle of relevancy . . . tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance, or dissent . . ." Wigmore, Evidence § 1071.

Stated another way, the mere silence of a party creates no evidence, one way or the other. *Vail* v. *Strong*, 10 Vt. 457, 463 (1838). Clearly, something of an uncertainty attends the interpretation of a person's silence, even as an implied admission of a statement made by someone else. Accordingly, it is generally recognized that silence is not admissible unless certain specific conditions exist, among which are that the party is capable of understanding the meaning of the statement or assertion made to him, he had sufficient knowledge of the facts embraced in the statement to reply thereto, the statement was made under such circumstances as would naturally call for a

reply and the statement was made by a person normally entitled to a reply.[9]

In this case, Greenfield's capability of understanding his Miranda rights is the very focus of whether his post-Miranda silence is probative. To assume that Greenfield was capable of understanding (and exercising) his Miranda rights would be a dangerous assumption, indeed, given the expert psychiatric testimony presented during the course of the trial. Whether and to what extent Greenfield had sufficient knowledge of the facts embraced in Officer Pilifant's explanation of Greenfield's arrest and the significance of Greenfield's Miranda rights is again, central to the issue surrounding the probative value of his post-arrest silence. Clearly, Greenfield was under no legal obligation to reply to Officer Pilifant's statements and as an individual's Fifth Amendment rights against self-incrimination are generally a matter of common knowledge among the citizens of this country, it can hardly be said that Greenfield, when confronted by a police officer who arrests him, "would naturally" reply. Lastly, Officer Pilifant is not a person who would normally be entitled to a reply, having just arrested Greenfield and advised him of his right *not* to make any statements.

The conditions precedent to the traditional admissibility of silence in the face of an assertion of fact are simply not present in the real world of police-suspect confrontation. The very essence of the Fifth Amendment protection embodied in the Miranda warnings eliminates two key conditions, that the silent party, when confronted, would naturally respond and that the statement met with silence was made by a person normally entitled to a reply. As one court has observed, after discussing the

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[9] See generally: 4 Wigmore, Evidence § 1071, § 1072 et seq.

traditional admissibility of silence in the wake of an assertion of fact which would naturally call for a reply:

> "If, as *Hale* and *Doyle* hold, a defendant's silence cannot be treated as a prior inconsistent statement for impeachment purposes, a fortiori it cannot be used substantively as an admission tending to prove the commission of the offense." *Boyer* v. *Patton*, 579 F.2d 284, 288 (3rd Cir. 1978) (where the defense of insanity was also raised by the defendant).

Petitioner argues that silence, to the extent that it shows lucidity at the time of Greenfield's arrest, is a fact which "could properly be evaluated by the jury" and would have been "useful and relevant for the jury to be able to evaluate the testimony concerning Respondent's behavior in light of the psychiatric testimony adduced" (Petitioner's br. at p. 23, 24). Petitioner's argument that evidence of a defendant's silence is "probative, reliable evidence on the issue of guilt" and "relevant to the defense of insanity" finds little support in the opinions of this Court. Whether silence has a tendency to make the existence of the fact to be proved (sanity) more probable or less probable simply does not turn on whether or not evidence of silence would be useful to the jury. Any assumptions of probativeness, which apparently underlie the reasoning of the small number of cases on which Petitioner relies, are not compatible with psychiatric realities. The psychiatric realities, gleened from even a cursory review of textbook psychiatry and the testimony offered during Greenfield's trial, underscore the naivete of Petitioner's theory that Greenfield's ability to understand and exercise his constitutional rights was probative and relevant. As agreed by all three trial psychiatrists, one of the four cardinal symptoms of paranoid schizophrenia is ambivalence. Dr. Loce characterized schizophrenia by its ability to "wax and wane in severity," stating that at times

it can be "quite latent or—so that it can't be seen, other times quite florid" (SR-202). In other words, the symptoms of the disorder "come and go" (SR-203). Intervals of lucidity and rationality, no less than litigousness and guardedness, are consistent with and typical of psychosis. Indeed, irregular shifts between lucid and confused moments are a clinical feature of schizophrenia:

> "Another strange but specific characteristic of schizophrenia is its unpredictability, variability or inconsistency. A schizophrenic patient may be incapable at a certain time of carrying on a rational, simple conversation and yet an hour later he may write a sensible and remarkably well composed letter to a relative. He may refuse to change his shirt for weeks and offend those around him by his strange behavior, but he may, on the same day, display perfect manners when attending a birthday party. He may be unable to figure the right change for a dollar purchase, yet he may be able to play a sophisticated game of bridge or chest." A. Freedman, H. Kaplan, *Comprehensive Textbook of Psychiatry,* p. 622-623 (1967).

According to the authorities, paranoid forms of psychosis also frequently manifest themselves in the very caution and preoccupation with real or perceived rights which Petitioner would attribute to sanity.

> "A typical paranoid patient is suspicious, guarded and reserved. Often he is hostile and aggressive. A. Freeman, H. Kaplan, *Comprehensive Textbook of Psychiatry,* at p. 633-634 (1967).

> "The patient with paranoia often talks much about his "rights" and wants justice done to him. He may instigate lawsuits alleging stolen property, embezzeled money, defrauded patent rights, defamation of character and financial conspiracies against him. The patient's paranoid system may have an obsessive

> quality that causes him to talk about it endlessly to his family and his acquaintances. In other instances the patient talks about it only when he finds a receptive listener or someone whom he feels can help him in resolving his grievances." A. Chapman, *Textbook of Clinical Psychiatry,* at p. 264 (1967).

The ambivalent nature of a schizophrenic individual's personality and behavior underscores the ambiguity of Greenfield's silence. According to the testimony of the trial psychiatrists, upon confronting a schizophrenic individual, one might encounter aggressive, paranoid behavior and at another time, encounter within the same person a reserved, withdrawn spirit. According to Freedman and Kaplan, "the paranoid individual's intelligence and capacity for appropriate social interaction may remain quite sophisticated in areas not invaded by his delusion. *Comprehensive Textbook of Psychiatry,* at p. 622-623 (1967).

All of this renders it unlikely that Greenfield's silence and request for an attorney tended to make the existence of his sanity more probable or less probable then it would be without the evidence. In the words of the Eleventh Circuit:

> "The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit and the closeness in time between the arrest and warning and the crime . . ." . For Petitioner to have consis-

tently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent . . . in this case, the evidence was probative only of Petitioner's ablity to understand English and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of Petitioner's sanity." (JA-24).

The Necessity Of It All—Is There Not Another Way?

In this case, just as in *Doyle*, Petitioner pleads necessity as justification for the prosecutor's use of Greenfield's post-arrest, post-Miranda silence (Petitioner's br. at p. 20). However, it simply is not necessary, in a typical case, to use silence and an invocation of a constitutional right to establish sanity.[10] In this case, the prosecutor was able to artfully draw out facts, including Greenfield's conduct, which he used to support his argument that Greenfield exhibited signs of sanity. It was unnecessary for the prosecutor to delve into Greenfield's silence in response to the Miranda warnings and his exercise of constitutional rights. In short, the prosecutor could have elicited exhaustive testimony from all witnesses who had contact with Greenfield as to his demeanor and behavior without

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[10] For example, in the instant case, Officer Pilifant testified that he confronted Greenfield, asked for and obtained identification, verified his name and advised him of his investigation. Greenfield did not hesitate when asked for the identification and did not indicate that he didn't understand (SR-74) Pilifant questioned Greenfield and had him roll up his pants legs. Greenfield did what he was asked to do without hesitation (SR-75). Greenfield put his hands behind his back to be handcuffed as requested. He didn't make any statements which didn't make sense or were "gibberish" (SR-83). He did not become violent and never appeared "not to comprehend what was going on" (SR-84).

using Greenfield's silence. Necessity cannot justify the use of one's silence and the exercise of one's constitutional rights, given the assurances contained in the Miranda warnings. These assurances are significant to *all* criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. e.g., *Harris* v. *New York*, 401 U.S. 222 (1971); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Fletcher* v. *Weir*, 455 U.S. 603 (1982).

When He Doesn't Say He Did, There's No Need To Prove He Didn't.

As recognized in *Doyle*, post-arrest silence can be used by the prosecution to impeach and contradict a defendant who testifies to an exculpatory version of facts and claims to have told the police the same version upon arrest. 426 U.S. at 619, n.11. The decisions of this Court following *Doyle* which have allowed use of post-arrest silence have uniformly justified its use because of the need for cross-examination and impeachment of a defendant who testifies in a manner inconsistent with his prior actions or prior statements and whose credibility becomes an issue. The obvious purpose is to ferret out perjury by utilizing traditional truth-testing devices of the adversary process. *Harris* v. *New York*, 401 U.S. at 223; *Jenkins* v. *Anderson*, supra; *Fletcher* v. *Weir*, supra.

Unlike *Jenkins*, *Harris* and *Fletcher*, Greenfield did not testify during his trial and therefore his credibility is not at issue and he was not subject to impeachment. There was no need, for example, to ferret out perjury. Had Greenfield taken the stand and denied that he exercised his constitutional rights or that he understood the officer's advisements, then under the rationale of *Jenkins* and *Harris*, Greenfield would have been properly subject

to cross-examination and impeachment by his prior inconsistent silence.

Furthermore, Greenfield's silence occurred *after* he had been arrested and advised of his Miranda rights. A careful review of these post-*Doyle* cases reflects that this Court has never shown a tendency to allow use of post-Miranda silence against a non-testifying defendant under any circumstances. To be sure, in *Fletcher* v. *Weir*, the case turned on the *absence* of the affirmative assurances embodied in the Miranda warnings, with this Court observing "the significant difference between the present case and *Doyle* . . . that the record does not indicate that respondent Weir received any Miranda warnings during the period in which he remained silent immediately after his arrest." 455 U.S. at 605. Most recently, in *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the *Doyle* logic was reiterated:

> ". . . the Miranda warnings emphasize the dangers of choosing to speak (whatever you say can and will be used as evidence against you in court) but give no warning of adverse consequences should you choose to remain silent. This imbalance of the delivery of Miranda warnings, we recognized in *Doyle*, implicitly assures the suspect that his silence will not be used against him." 103 S.Ct. at 924.

There Must Be Meaning In Miranda And The Fifth Amendment

Comment by a prosecutor on the exercise of the Fifth Amendment privilege against self-incrimination diminishes the privilege by making its assertion costly and accordingly, both due process and the Fifth Amendment forbid evidentiary use of a defendant's claim of that privilege in the wake of Miranda warnings. *Griffin* v. *California*, 380 U.S. 609 (1965). Invoking one's right to silence in the wake of Miranda warnings is tantamount to assertion of the Fifth Amendment, of course.

Silence is definitely not physical evidence and is not testimonial in a technical sense. However, it is inextricably tied to the testimonial option not to incriminate one's self, protected by the Fifth Amendment. As a practical matter, if this option/decisional "conduct" is not protected against use by the prosecution, no Fifth Amendment protection would exist with respect to a defendant such as Greenfield. According to Petitioner's argument, there would be no alternative to self-incrimination for a defendant such as Greenfield, who may have available to himself the defense of insanity. He would either incriminate himself by inference from silence or by verbal means. *Greenfield* v. *Wainright*, 741 F.2d 329 n.6 (11th Cir. 1984). Respondent suggests that *Doyle* does not envision putting a criminal defendant to this choice, especially when the choice is induced by the assurances contained in the Miranda warnings.

The Unfairness Of It All—Misplaced Reliance And A Price On Silence

Nothing in the Miranda warnings given to Greenfield limited them to the instance where guilt, rather than sanity, would be the issue. Since *Doyle*, this Court has consistently prohibited the use of post-arrest, post-Miranda silence, reasoning that silence which may be induced by the implicit assurances contained in the Miranda warnings should not, as a matter of fundamental fairness, be used by the prosecutor. *Fletcher* v. *Weir*, supra, *Jenkins* v. *Anderson*, supra, *Anderson* v. *Charles*, 447 U.S. 404 (1980).[11] Doyle recognizes the implicit

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[11] To the extent Petitioner relies on *South Dakota* v. *Neville* as authority for the use of post-arrest, post-Miranda silence, it should be noted that the evidence sought to be used, the defendant's refusal to take a blood alcohol test, did not rise to constitutional dimension, as the defendant's right to refuse the blood alcohol test was referred to as "a matter of grace bestowed by the South Dakota legislature." 103 S.Ct. at 924.

assurance made to a defendant that he will not be penalized if he chooses to exercise his Miranda rights. 426 U.S. at 618. A defendant whose defense is insanity is no less entitled to shielding from this penalty than a defendant with a more traditional defense.[12] The rationale underlying the prohibition against the use of silence remains:

> "To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the Fourteenth Amendment and Article I, § 9 of the Florida Constitution." *State of Florida* v. *Burwick*, 442 So. 2d 944, 948 (Fla. 1983) cert. denied ___ U.S. ___, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

On page 23 of his brief, Petitioner argues that the inference of guilt by silence does not "logically or reasonably apply to the issue of mental competency." Petitioner, in making this assertion, ignores that the inference to be drawn from silence, whether used to establish guilt by silence or sanity, results in the same ultimate use, to establish criminal culpability.

In the traditional sense, the obvious inference to be drawn from post-arrest silence is guilt. The use of Greenfield's silence and his invocation of his right to counsel were clearly an attempt by the prosecutor to draw meaning, i.e., sanity and guilt, from that silence and Sixth Amendment assertion. In Florida, insanity equates with innocence.[13] Accordingly, it would not be proper for the

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[12] If the rule were otherwise, a warning would be required to say: If you say anything it will be used against you; if you do not say anything, that will be used against you . . . (too) ." *McCarthy* v. *United States*, 25 F.2d 298, 299 (6th Cir. 1928).

[13] *State Ex Rel Boyd* v. *Green*, 355 So.2d 789, 793, (Fla. 1978) (The basis of an insanity defense is that a person is unable to form the requisite intent. Since intent is an element of most crimes, a lack of intent precludes criminal responsibility. at 792. Insanity specifically

prosecutor to ask a jury to draw a direct inference of guilt from silence and to argue, in effect, that silence is inconsistent with innocence (insanity). *State of Florida* v. *Burwick*, supra.

The speciousness of a distinction between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* has been recognized in opinions in various state courts.[14] In Florida, mental intent is an essential element of a criminal offense, which must be proven beyond a reasonable doubt and which should not, therefore, be relegated to an "after-the-fact" issue, as seemingly suggested by Petitioner.

There Can Be No Constitutional Distinction Between Defenses In Applying Doyle

This Court has admonished that the insanity defense cannot, any more than any other defense, be prejudiced by the admission of unconstitutionally seized evidence. *Kaufman* v. *United States*, 394 U.S. 217, 230, (1969). Accordingly, a defendant who raises an insanity defense

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contemplates the lack of an essential element of the crime, i.e., intent. 355 So.2d at 793).

Since 1902, the test of legal insanity in Florida is the "M'Naghten Rule" or "right-wrong test." *Davis* v. *State*, 32 So. 822 (Fla. 1902), as affirmed and modified: *Wheeler* v. *State*, 344 So.2d 244 (Fla. 1977) cert. denied 440 U.S. 924 (1979).

[14] See e.g. *People* v. *Rucker*, 26 Cal. 3rd 368 (1980), in which the California Supreme Court found "irrelevant" a purported distinction between substantive use of evidence obtained in violation of Miranda and its use to show an ability to respond logically. In *Commonwealth* v. *Mahdi*, 448 N.E.2d 704 (Mass. 1983), the Massachusetts Supreme Court stated:

> "The ultimate constitutional right at issue is still the right to remain silent . . . fundamental unfairness results from the use of evidence of such silence regardless whether the person exercising his or her constitutional right to remain silent claims insanity as a defense."

should not be any less entitled to the protection of due process simply because the crux of his case revolves around his mental state. Even when sanity is the sole issue, the use of post-Miranda silence is no less egregious than in any other case and no less a penalty. Elementary fairness dictates that the invocation of rights will not be used to impeach a defense subsequently presented at trial. *Raley* v. *Ohio*, 360 U.S. 423, 437-440 (1959). That Greenfield raised an affirmative defense, for which he shouldered some burden, should not preclude application of the *Doyle* rule, as *Doyle* has been applied by various courts to affirmative defenses such as self-defense, duress and entrapment.[15]

Petitioner's reliance on *Sulie* v. *Duckworth*[16] is misplaced. That court was concerned only with the use of a defendant's post-Miranda request for an attorney and did not involve the use of a defendant's post-Miranda silence. The court specifically noted that "evidence of his silence would not be admissible against him in his criminal trial." 689 F.2d 128, 129. *United States* v. *Trujillo*, 578 F.2d 285 (10th Cir. 1978), cert. denied 439 U.S. 858 (1978), is distinguishable on its facts. In that case, the court noted that "the government did not exploit post-arrest silence," citing *United States* v. *Hale*, and in light of that statement, it can be safely assumed that had the government exploited or highlighted Trujillo's post-Miranda silence, the Tenth Circuit would not have been so tolerant. In the Greenfield trial, however, the prosecutor, during final summation, argued the significance of Greenfield's post-Miranda silence and request for an attorney, thereby highlighting Greenfield's silence and "striking at the jugular" of Greenfield's defense and improperly undermining that defense. See: *United States* v. *Harp*, 536 F.2d 601, 603 (5th Cir. 1976) (holding that remarks which strike at the jugular cannot be classified as harmless).

Jacks v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981), also cited by Petitioner, is likewise distinguishable on its facts. Jacks did not remain silent after being given Miranda warnings and voluntarily and freely spoke with the arresting officer. The court specifically noted that neither *Doyle* nor *Hale* was applicable because the case did not involve the use of defendant's silence.

Petitioner offers no reason for retreating from *Doyle* which outweighs the protections afforded by a rule prohibiting the use of post-Miranda silence. Nor is there sufficient reason for excepting an insanity defendant's case from the protections afforded in *Doyle*, as *Doyle* applies its holding generally to all arrested defendants and does not distinguish between defenses in its treatment of the "dubious probative value" of silence and the unfair use of silence in the face of the Miranda assurance. When balancing interests, as suggested in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), it is useful to consider both ends of the proverbial scale. The right to silence should not be unduly burdened and any relevancy or pro-

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[15] Cases applying *Doyle* where affirmative defense raised: *Reid* v. *Riddle*, 550 F.2d 1003 (4th Cir. 1977) (self-defense); *United States Ex Rel Allen* v. *Franzen*, 659 F.2d 745 (7th Cir. 1981), cert. denied 456 U.S. 928 (1982) (self defense); *United States* v. *Harp*, 536 F.2d 601 (5th Cir. 1976) (duress); *United States* v. *Curtis*, 644 F.2d 263 (3rd Cir. 1981) cert. denied 459 U.S. 1018 (1982) (entrapment); *Morgan* v. *Hall*, 569 F.2d 1161 (1st Cir. 1978) cert. denied 437 U.S. 910 (1978) (consent in rape case). Even where the defendant admits the physical acts constituting the offense, *Doyle* has been applied where the defendant's mental state is at issue. See: *United States* v. *Johnson*, 558 F.2d 1225 (5th Cir. 1977) (defense of lack of knowledge); *United States* v. *Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978) (lack of knowledge).

[16] 689 F.2d 128 (7th Cir. 1982), cert. denied 460 U.S. 1043, (1983).

bativeness of that silence must be so compelling in a given situation as to far outweigh the elasticity of the protections provided by *Doyle*. There is no valid evidentiary or constitutional reason for retreating from *Doyle*, simply because the defense of insanity is presented, as opposed to a more traditional defense.

II.

WHETHER DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE INTRODUCTION OF TESTIMONY CONCERNING DEFENDANT'S POST-MIRANDA SILENCE CONSTITUTES A PROCEDURAL DEFAULT BARRING REVIEW UNDER *WAINWRIGHT* V. *SYKES*, 433 U.S. 72 (1977), WHERE DEFENSE COUNSEL OBJECTED TO THE PROSECUTOR'S COMMENT UPON DEFENDANT'S POST-MIRANDA SILENCE DURING SUMMATION AND THE STATE APPELLATE COURT ADDRESSED THE MERITS OF THE ISSUE, OR WHETHER REVIEW BY THIS COURT SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE *WAINWRIGHT* V. *SYKES* QUESTION IN THE COURT OF APPEALS EXCEPT IN A PETITION FOR REHEARING?

The *Wainwright* v. *Sykes* Issue Is Not Properly Before The Court

For the first time since the United States Magistrate entered his Report and Recommendation (JA 47), with the exception of Petitioner's Motion for Rehearing filed with the Eleventh Circuit, Petitioner asserts that consideration of this significant constitutional issue is barred by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Petitioner did not assign as error in the court below the issue he now asks this Court to review. Neither was the applicability of *Wainwright* v. *Sykes* considered by the court below, other than parenthetically in a footnote in the decision (JA 10).

The issue of waiver was fully litigated in the District Court. Evidentiary proceedings were held on the issue over which the United States Magistrate presided, with

Greenfield presenting a "cause" and "prejudice" defense to the allegation of waiver (see transcript of evidentiary hearing held October 3, 1980). The Magistrate made specific findings and recommended that the case not be dismissed under *Wainwright* v. *Sykes* (JA 47). The Petitioner did not, as he had a right and obligation to do, file written objections to the proposed findings and recommendations of the Magistrate, as required by 28 U.S.C. § 636(b)(1), Local Rule 6.102, Rules for the United States District Court, Middle District of Florida and *Nettles* v. *Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Apparently satisfied with the adverse decision of the District Court on the merits, Petitioner did not raise the *Wainwright* v. *Sykes* issue by way of cross-appeal or otherwise. Only belatedly, in his petition for Rehearing to the Eleventh Circuit Court of Appeals, did Petitioner raise the issue (JA 38). Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937). *Dorszynski* v. *United States*, 418 U.S. 424, 431 n.7 (1974). *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here.") Furthermore, considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches the Supreme Court. *Jenkins* v. *Anderson*, 447 U.S. 231, 234, n.1.

Alternatively, Review Is Not Barred By *Wainwright* v. *Sykes*, As The Issue Was Preserved By Proper Objection And Was Addressed On The Merits By The State Appellate Court.

Greenfield's counsel made appropriate objections, brought the issue to the attention of the state court in accordance with then-existing state procedural rules and otherwise preserved the issue for appeal. The state trial court and the state appellate court addressed the merits

of the issue. Furthermore, the record reflects that there was adequate cause for any failure to object and Petitioner suffered prejudice as a result of that cause.

Petitioner's contention that Greenfield has failed to make a contemporaneous objection is tenuous at best. Notwithstanding Greenfield's counsel's failure to object during the state's case in chief when the testimony of Officers Pilifant and Jolley was elicited, he strenuously objected during the prosecutor's final argument when actual use was made of the silence. (SR-339; JA 97, 98). Since the prosecutor's remarks during summation were in themselves violative of *Doyle* and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under the rationale of *Sykes*, since the related objection sufficiently raised the constitutional issue. See: *Thomas* v. *Estelle*, 582 F.2d 939 (5th Cir. 1978); *Collins* v. *Auger*, 577 F.2d 1107 (8th Cir. 1978), cert. denied 439 U.S. 1133 (1979). *Griffin* v. *California*, supra.

In *Sykes*, the contemporaneous objection/waiver rule arose where the trial court, because of a lack of objection, had no opportunity to correct the defect and avoid problematic retrials. One of this Court's concerns in *Sykes* was that a defendant's counsel might "sandbag" the court and gamble on an acquittal while saving a dispositive claim in case the gamble didn't pay off. 433 U.S. at 89-90. However, in the instant case, it can hardly be said that Greenfield's attorney "sandbagged" the court. When he objected during the prosecutor's final summation which highlighted Greenfield's post-Miranda silence, the trial court had the "opportunity to correct the defect and avoid problematic retrials." (JA 97, 98) The jury could have been instructed, the prosecutor admonished and the only question left for consideration would have been whether

harmless error existed. Furthermore, this record reflects that counsel's failure to object was the result of a combination of inattentiveness and the rigors of a hotly contested trial and a complex defense (See generally: transcript of evidentiary hearing held October 3, 1980 before the Magistrate).

That defense counsel's failure to object was not a purposeful "sandbagging" of the trial court is further evidenced by counsel's many attempts to have the issue ruled upon by the trial court. Not only did he object and offer argument during the prosecutor's summation, he filed and argued a Motion for New Trial (Petitioner's Exhibits No. 1 and 3, submitted to the District Court) and filed an assignment of errors for purposes of appeal. (Petitioner's Exhibit No. 4). In sum, defense counsel did everything he could do to present the issue to the trial court and thereby preserve it for appellate review.

The State Appellate Court Addressed The Merits Of The Issue And Therefore Federal Review Is Not Barred By *Wainwright* v. *Sykes*

Petitioner suggests that the Florida appellate court only alternatively addressed the merits of the constitutional issue before this Court for review. By inference, Petitioner is suggesting that the state appellate court cannot be said to have addressed the merits of the issue, because the case was remanded by the Florida Supreme Court and per curiam affirmed by the Second District Court of Appeal (Petitioner's br. at pp. 29, 30). This suggestion is dispelled by the Florida Supreme Court's acceptance of conflict certiorari[17] in *State of Florida* v. *Burwick*, supra, in which that court disposed of conflict

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[17] Art V, § 3(b)(3), Florida Constitution.

between the Second District of Appeal's opinion in *Greenfield* v. *State*, 337 So.2d 1021 (Fla. 2nd DCA 1976) and *Burwick* v. *State*, 408 So.2d 722 (Fla. 1st DCA 1982). The Florida Supreme Court apparently considered that the Second District Court of Appeal had reached the merits of this important constitutional issue in Greenfield's appeal and accordingly, it is properly and appropriately preserved for review by this Court.

Where a state appellate court reaches the merits of a claim which would otherwise be barred from federal review because of a procedural default, the federal court is obligated to consider the claim on the merits. *Lebowitz* v. *Wainwright*, 670 F.2d 974, 978 n.8 (11th Cir. 1982), citing *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 (1975).[18] *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 147-154 (1979); *Engle* v. *Isaac*, 456 U.S. 107, 135 n.44 (1982). *Sykes* deals "only with contentions of federal law which were not resolved on the merits in a state proceeding due to one's failure to raise them as required by state procedure," and creates no bar to independent determination by the federal court where the merits were reviewed by the state court. 433 U.S. at 72.

To the extent that Petitioner suggests that review is barred because Greenfield's trial counsel neglected to move for a mistrial in conjunction with his objection to the prosecutor's summation, Florida's requirement of a request for a mistrial is a matter of decisional case law which evolved *after* Greenfield's trial rather than a specific procedural rule. A *Wainwright* v. *Sykes* waiver must

[18] See: n. 9 at 420 U.S. 292; *Newman* v. *Henderson*, 425 U.S. 967 (1976), granting Petition for Writ of Certiorari and remanding Habeas Corpus case for further consideration, citing *Lefkowitz* v. *Newsome*, supra.

be from a specific state procedural rule. *Freeman* v. *State*, 599 F.2d. 65, 71 (5th Cir. 1979), cert. denied 444 U.S. 1013 (1980).

Clark v. *State*, 363 So.2d 331 (Fla. 1978) cited by Petitioner as authority for the procedural default, was decided *after* Petitioner's trial. *Clark* decided only ". . . whether a contemporaneous objection is necessary to preserve as a point on appeal . . ." 363 So.2d at 332. Furthermore, *Clark* has been clarified by the Florida Supreme Court, which has determined that a motion for mistrial is not necessary to preserve the matter for appellate review, where a defendant has, by objecting, brought the error to the court's attention. *Simpson* v. *State*, 418 So.2d 984, 986 (Fla. 1982) cert. denied. 459 U.S. 1156 (1982).

Cause And Prejudice Are Present

Although evidentiary proceedings were held before the United States Magistrate on the *Sykes* issue and on whether cause and prejudice existed to overcome the procedural default alleged, the Magistrate did not address himself to these issues, finding that the matter had been preserved in the state court by proper objection and in any event, the state appellate court had addressed itself to the merits of the issue (JA 49, 43).

Independent of the Magistrate's findings, there exists "cause" for counsel's failure to object and "prejudice" which warrants federal review. *Wainwright* v. *Sykes*, 443 U.S. 72, 87. The "cause" requirement may be satisfied under certain circumstances when a procedural default is not attributable to an intentional decision by counsel made in pursuit of his client's interests. *Reed* v. *Ross*, ___ U.S. ___, 104 S.Ct. 2908 (1984) (failure of counsel to raise a constitutional issue reasonably unknown to him held to

be one situation in which "cause" requirement is met). It follows, therefore, that counsel's neglect or inattentiveness, rising to the level of ineffectiveness, should satisfy the "cause" requirement. See: e.g. *Alston* v. *Garrison*, 720 F.2d 812 (4th Cir. 1983), (where the failure to object to evidence of defendant's post-Miranda silence was prejudicial under the two prong test where such evidence came in on three occasions with a failure to object); *Boyer* v. *Patton*, 579 F.2d 284 (3rd Cir. 1978) (where failure to object to use of silence constitutes ineffective assistance of counsel and is prejudicial because of the egregious nature of the error).

During the evidentiary hearing before the Magistrate, Greenfield's trial attorney explained that he had a "whole desk full of depositions," and was dealing with three psychiatrists while the trial was going on, in this "very, very complex case" (TR p. 14). The questioning concerning Greenfield's silence "didn't ring a bell at the time of trial as far as making ar. objection" due to counsel's admitted inadvertance (TR 17). However, when the prosecutor focused on and stressed the silence in his closing remarks, trial counsel recognized the error and objected (Tr 8, 17). According to counsel, he didn't know if the questions even registered in his mind (TR 27).

There can be no doubt that counsel, when it finally dawned on him that comment was being made on his client's silence, recognized the error and objected. He was aware of the constitutional significance of the error (TR 6). Given counsel's admissions that the questioning did not "ring the bell," it cannot be said that his failure to object was an intentional decision made in pursuit of his client's interests. *Reed* v. *Ross*, supra. That he was aware of the constitutional significance of the error but was busy with other things such that the questioning did not "register"

with him underscores counsel's negligence and inattentiveness. This conduct falls well below the role required of counsel and which is necessary to insure that the trial is fair. *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052, 2063 (1984). In this instance, counsel's neglect and inattentiveness allowed a prosecutor to not only bring forth evidence of Greenfield's post-Miranda silence but to argue it as probative to Greenfield's sanity, which undermined the only defense available to Greenfield.

In this close case, in which the jury ultimately had to consider the conflicting testimony of the expert witnesses who testified concerning Greenfield's mental status, it cannot be said that the prosecutor's use of Greenfield's silence did not prejudice the defense. Nor can it be said that the jury's consideration of Greenfield's post-arrest silence "had no effect on the judgment." *Strickland* v. *Washington*, 104 S.Ct. at 2067.

A Miscarriage Of Justice

In *Sykes*, this Court stated that its cause and prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice" 433 U.S. at 91. Accordingly, even if this Court were to determine that counsel's failure to object during the course of the trial constituted a procedural default, given the nature of the constitutional violation under *Doyle*, and the reason for the default, Greenfield will indeed be "a victim of a miscarriage of justice" if review is barred. His due process rights will have been trampled upon because of counsel's neglect or inattentiveness. The very rationale underlying *Doyle*, that use of post-Miranda silence is "fundamentally unfair," renders application of *Wain-*

wright v. *Sykes* to Greenfield's case a "miscarriage of justice."

CONCLUSION

Based upon the foregoing argument and citations of authority, Respondent asks this Court to affirm the Eleventh Circuit Court of Appeals and hold that, absent testimony from a defendant which places his credibility in issue, it is fundamentally unfair and a violation of due process to use or comment upon a defendant's post-arrest, post-Miranda silence and his request for counsel, regardless of the defense raised.

Further, Respondent asks this Court to decline to review the *Wainwright* v. *Sykes* issue raised by Petitioner bacause of Petitioner's failure to preserve this issue for review or alternatively, to hold that Respondent properly preserved the constitutional issue raised in this case through appropriate objection and presentation of the merits of the issue to and consideration by the state appellate court.

Respectfully Submitted,

WHITTEMORE & CAMPBELL, P.A.

JAMES D. WHITTEMORE
One Tampa City Center
Suite 2470
Tampa, FL. 33602
(813) 224-9550

Counsel for Respondent
(Appointed by this Court)